No. 96-818 (4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ANTHONY MACERI; ANTONINO ENTERPRISES, INC.,

Petitioners,

vs.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, a Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & CO. REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THOMAS TORMEY

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QUESTIONS PRESENTED

I. Should federal courts re-litigate alleged violations of constitutionally based civil rights where those asserted violations were the predicate of actions fully and completely tried and appealed in state courts?

II. Should the individual Respondent Thomas Tormey, a private citizen, be subject to liability for civil rights damages in this action when he was not joined as a party in prior state court litigation where those claims were fully litigated against other respondents herein?

III. Does the Eighth Amendment concept of "cruel and unusual punishment" apply to enforcement of municipal zoning and health and welfare regulations where due process was afforded to a developer who took no steps to abate violations?

LIST OF PARTIES

The Petitioner Anthony Maceri is the sole stockholder, officer and director of the Petitioner Antonino Enterprises Inc.

The corporate entity was the only party plaintiff in the extensive underlying state court litigation and was at all times the owner of the real property and the structure in question.

The Respondent Thomas Tormey is a private citizen who lived in close proximity to the subject real property and also not a party in the state litigation. The complaint in this case against Respondent Tormey alleges in paragraph 10:

> Defendant, Thomas Tormey, is a resident of Clifffside Park. He urged Defendant Calabrese to act, without a hearing or other due process, to revoke plaintiff's building permit as plaintiff's two-family home was nearing completion.

(Resp. App. 1a, *infra*).

Paragraph 31 of Petitioner's complaint further alleges a "conspiracy by two or more of the defendants" to deprive petitioners of their rights. (Resp. App. 1a).

The aforesaid allegations are the only ones asserted in the pleadings against the Respondent Tormey.

The following Respondents have been categorized and identified as the Municipal Respondents: Robert Cimmino, Construction Official; Borough of Cliffside Park; Brian T. McGuirt, Cliffside Park Borough Clerk; Stephen T. Boswell, Borough Engineer; Christos J. Diktas; Diktas & Habeeb, a law

partnership and Gerald A. Calabrese individually and as Mayor of Cliffside Park. Said parties have commonality of interest and are all collectively represented by single counsel.

Respondent Calabrese & Company Realty Inc. is a real estate brokerage corporation and Respondent Gerald A. Calabrese Jr. is alleged to be a 50% owner of Calabrese & Company Realty Inc., a Bergen County Commissioner and the son of Respondent Gerald A. Calabrese.

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I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes:

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

28 U.S.C. Section 1738

[State] . . . Judicial Proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

New Jersey Statutes:

N.J.S. 40:48-2.3

It is hereby found and declared that . . . buildings . . . which . . . are unfit for use are inimical to the welfare and dangerous and

> injurious to the health and welfare of the people . . . that a public necessity exists for the repair, closing or demolition of such building. . . . Whenever any municipality finds [such building] . . . power is hereby conferred upon such municipality. . . to . . . demolish . . . such building . . .

COUNTER-STATEMENT OF THE CASE

The Petitioners filed a verified complaint in the District Court below seeking to enjoin the demolition of a partially constructed two-family residence on a lot in the Borough of Cliffside Park, New Jersey. A claim for damages was also made "in excess of $350,000." Violations of Petitioners' civil rights and other United States constitutional rights are alleged.

Construction of the two-family home in question was commenced pursuant to permits issued by the Borough of Cliffside Park. However, immediately prior to commencement of construction, the governing body of the municipality adopted an amendment to the zoning ordinance changing Petitioners' lot and others from a two-family-residence zone to a single-family-residence zone.

During construction, the Petitioner Antonino Enterprises, Inc. sought to obtain appropriate zoning variances to permit completion of the structure as a two-family residence which variances were denied by the municipal regulatory bodies.

Thereafter, Petitioner Antonino Enterprises, Inc. instituted litigation in the courts of the State of New Jersey seeking to obtain relief from the denial of the requested variances claiming its civil rights were violated along with other rights protected by the United States Constitution. The Respondent Thomas

Tormey was not named as a defendant in the New Jersey proceedings.

The New Jersey Court litigation resulted in determinations by the Superior Court, Chancery Division and Superior Court, Appellate Division and New Jersey Supreme Court (denial of certification) that Petitioner's claims for relief should be denied.

At the conclusion of the New Jersey state court litigation, the Borough of Cliffside Park advised the Petitioners that unless the partially completed two-family structure was brought into compliance with the amended zoning ordinance that demolition would ensue.

The Petitioners then filed the present action in the United States District Court for the District of New Jersey and for the first time named Respondent Tormey as a defendant. On Petitioners' application, a temporary restraining order and order to show cause against demolition was issued in the District Court below. The injunctive relief was ultimately denied by the trial court and an emergent appeal to the Third Circuit also resulted in denial of injunctive relief. In the course of these proceedings Petitioners were offered the opportunity to bring the building into zoning compliance. Petitioners refused.

Thereafter the Borough of Cliffside Park proceeded with the demolition of Petitioner Antonino Enterprises, Inc.'s structure as permitted by N.J.S. 40:48-2.3.

On motions by all Respondents, the District Court below dismissed the complaint of the Petitioners for failure to state a cause of action. The court found that all causes of action had been heard and adjudicated in prior litigation in the courts of the State of New Jersey and that the entire controversy doctrine was applicable. The court below also ruled that Respondent

Tormey's alternate summary judgment motion relief was moot by virtue of the court's dismissal of the complaint for failure to state a cause of action.

The District Court thereafter imposed monetary sanctions against Petitioners and their attorney for bringing duplicative litigation by way of this suit. Sanctions were vacated by the District Court on the basis that Petitioners' attorney made a good faith judgment that he could proceed in this case due to the subsequent demolition of Petitioners' building by the Borough of Cliffside Park. No ruling was made that the demolition constituted or was the basis of a new cognizable cause of action.

The Third Circuit below affirmed all aspects of the District Court determinations.

The Petitioners now seek a review of the Third Circuit's affirmance of the dismissal of their complaint.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL ISSUES AND CLAIMS HERE PRESENTED ARE PRECLUDED BY THEIR PRIOR DETERMINATION IN NEW JERSEY STATE COURT PROCEEDINGS TO WHICH FULL FAITH AND CREDIT MUST BE GIVEN.

The underlying basis of all of Petitioners' arguments in seeking the grant of a writ of certiorari is that actual demolition of the structure took place after the conclusion of the state court litigation. It is claimed that the demolition was a fundamental violation of a property owner's constitutional rights thereby giving standing to the complaint dismissed below.

In the first instance, Petitioners argue that the prior state court litigation did not include a determination of the Petitioners' constitutional claims to wit: — violations of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

It is clear from the opinion of the Third Circuit below that it, as well as the District Court, fully recognized that the constitutional claims were litigated in the New Jersey state courts. (Pet. App. 8A,9A). Even if they were not litigated, the New Jersey entire controversy doctrine applies. Indeed, this Court has heretofore denied certiorari where civil rights claims were not raised in zoning matters litigated in New Jersey state courts. *Bernards Quarry v. Borough of Bernardsville,* 929 F.2d 927 (3d Cir. 1991), *cert. denied,* 502 U.S. 861, 112 S. Ct. 182, 116 L. Ed. 2d 144 (1991). *See also Ward v. Village of Ridgewood,* 531 F. Supp. 470 (D.N.J. 1982).

Most appropriately, the court in the *Bernards Quarry* case stated:

> Pursuant to the Entire Controversy Doctrine under New Jersey law, a plaintiff is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding. To the extent that BQI did not adjudicate every aspect of its federal claims, it is now barred from raising them again.

929 F.2d 930.

To side-step the obvious preclusive effect of the doctrines of *res judicata*, collateral estoppel and entire controversy, Petitioners alternatively urge that the demolition of the structure in question following the conclusion of the state litigation gave rise to additional new or renewed constitutional claims cognizable now in the federal court.

The distinction Petitioners raise is without legal effect. Whether or not the occurrence of demolition was previously addressed, it was certainly a potential future course of action available to the Municipal Respondents of which Petitioners had notice when their constitutional claims were litigated in the state courts. *See* N.J.S. 40:48-2.3.

Petitioners' constitutional claims alleged to be flowing from the demolition are predicated upon the totality of facts and issues concluded adversely to Petitioners in the state litigation. They are one and the same.

No new cause of action was created by the demolition, just additional foreseeable damage not presently actionable, if at all, due to the preclusive effect of the New Jersey judgments and the *res judicata*, collateral estoppel and entire controversy doctrines.

No reason, compelling or otherwise, is advanced by the Petitioners why full faith and credit should not be given for the prior decisions of the New Jersey state courts pursuant to 28 U.S.C. § 1738.

II.

THE EIGHTH AMENDMENT, HERE RAISED AS AN ISSUE FOR THE FIRST TIME, IS INAPPLICABLE TO MUNICIPAL ZONING REGULATIONS AND THE POWER OF THE STATE TO PROTECT THE HEALTH AND WELFARE OF ITS CITIZENS BY REMOVING A STRUCTURE AND SHOULD NOT BE EXTENDED THERETO.

Petitioners' complaint, unamended to date, does not include any claim based on the building demolition being cruel and unusual punishment forbidden by the Eighth Amendment. For this reason alone, consideration to this allegation should not be given.

However, assuming this issue is appropriately before the Court, no equitable or legal implications in this matter compel reconsideration of prior decisions by this Court that the Eighth Amendment prohibitions apply only to criminal or criminal-sounding punishment. *Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Austin v. United States,* 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

Petitioners' structure was demolished after appropriate due process and Petitioners' failure to abate zoning violations pursuant to a New Jersey legislative declaration that such buildings were a danger to the health and welfare of its citizens. N.J.S. 40:48-2.3. No criminal act was involved and no new criminal conduct was being defined.

III.

RESPONDENT THOMAS TORMEY, A PRIVATE CITIZEN, CANNOT BE HELD LIABLE FOR DAMAGES ON ANY LEGAL THEORY ASSERTED BY PETITIONERS IN THIS CASE

The only specific conduct of the Respondent Thomas Tormey, a private citizen, about which Petitioners' complain is that he urged Mayor Calabrese to "act, without a hearing or due process, to revoke [Petitioners'] building permit . . ." and his act was committed in furtherance of a conspiracy among two or more unspecified Respondents. (Resp. App. 1a).

The Fourth, Fifth, Eighth and Fourteenth Amendments, as asserted to be applicable here, are, of course, directed to state action. So is 42 U.S.C. § 1983, unless private action is taken under color of state law. *See Groman v. Township of Manalapan,* 47 F.3d 628 (3d Cir. 1995) and extensive case citation therein.

At worst, Respondent Tormey called the attention of the Municipal Respondents to an existing zoning violation. Subsequent non-criminal remedial action by the Municipal Respondents ensued. Under any of the three tests elucidated in *Groman:* (1) the exclusive government function test; (2) the joint participation or symbiotic relationship test; or (3) the nexus approach, Tormey's action was only that of a concerned private citizen.

Also, conspiracy allegations pleaded without factual specificity, as is here the case, are insufficient to withstand a motion to dismiss a Section 1983 claim. *Hauptmann v. Wilentz,* 570 F. Supp. 351 (D.N.J. 1983), *affirmed,* 770 F.2d 1070 (3d Cir 1985), *cert. denied,* 474 U.S. 1103, 106 S. Ct. 887, 88 L. Ed. 922 (1986).

Respondent Tormey's alleged conduct was known or should have been known to Petitioners at the time of the state court litigation. He was not named as a defendant, and any legal theory presented against him now in the federal court is barred by the entire controversy doctrine. *Cogdell v. Hospital Center at Orange,* 116 N.J. 7 (1989). *See also* Point I of this brief.

CONCLUSION

The Petition for a Writ of Certiorari is void of the compelling reasons essential to its grant. No court decision is in conflict with another, nor has any court deviated from existing law or usual judicial proceedings. And, no important question of federal law is presented.

Under our system of jurisprudence, not every financial loss has, or, is deserving of the counter-point of an available remedy for damages. This is such a case.

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM PETITIONERS' COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ON AUGUST 24, 1993

"10. Defendant Thomas Tomey is a resident of Cliffside Park. He urged Defendant Calabrese to act, without a hearing or other due process, to revoke Plaintiff's building permit as Plaintiff's two-family home was nearing completion."

"31. The Defendants' acts and omissions aforesaid were committed in furtherance of the conspiracy among two or more of the Defendants. . . ."